

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NORTH SHORE CADILLAC-OLDSMOBILE, INC.	:	DETERMINATION
	:	DTA NO. 817934
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 28, 1998.	:	

Petitioner North Shore Cadillac-Oldsmobile, Inc., c/o of Steven G. Pinks, Esq., 140 Fell Court, Hauppauge, New York 11788, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 28, 1998.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on May 3, 2001 at 10:30 A.M. and continued to conclusion on May 4, 2001 at 9:15 A.M. at the same location with all briefs to be submitted by September 7, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared by Wickham, Wickham & Bressler, P.C. (Eric J. Bressler, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Dennis A. Fordham, Esq., of counsel).

ISSUES

1. Whether a transaction by which petitioner, North Shore Cadillac-Oldsmobile, Inc., acquired the assets of Ronald Cadillac-Oldsmobile, Inc. constituted a bulk sale within the meaning of Tax Law § 1141(c) and 20 NYCRR 537.1(a)(1) or whether there was a transfer in

settlement or realization of a valid lien which is excluded from the definition of a bulk sale under 20 NYCRR 537.1(a)(4).

2. Whether the lien of the Division of Taxation (“Division”) on the proceeds of the bulk sale under Tax Law § 1141(c) was superior to the lien of the Bank of Smithtown acquired, in accordance with the Uniform Commercial Code, pursuant to a previously filed security interest.

3. Whether the Division issued a timely notice of claim and notice and demand as measured by the 5-day and 90-day requirements set forth in Tax Law § 1141(c) and 20 NYCRR 537.6.

4. Whether petitioner is estopped from denying that the transfer in issue was a bulk sale because the Division was misled into believing that petitioner would remit the proceeds of the sale to New York State in order to induce it to release portions of the seller’s frozen bank accounts.

5. Whether Tax Law § 1141(c) is unconstitutional because it gives the statutory lien of the Division of Taxation a priority over a previously filed lien.

FINDINGS OF FACT

1. Ronald Cadillac-Oldsmobile, Inc. (“Ronald Cadillac”) was an automobile dealership located in Huntington Station, New York. The principal stockholder of the business was Ronald DeMarco. On October 5, 1995, Ronald Cadillac entered into a General Loan and Security Agreement (“Security Agreement”) with the Bank of Smithtown (“Bank”) which was filed with the Suffolk County Clerk on October 10, 1995. On September 23, 1997, Ronald Cadillac executed a Commercial Installment Note (“Note”) in the amount of \$581,412.00. The loan from the bank was accompanied by UCC-1 financing statements. Ronald Cadillac also obtained floor plan financing from General Motors Acceptance Corp. (“GMAC”) for its automobiles. The loan

was protected by a security interest in Ronald Cadillac's inventory of automobiles and was similarly evidenced by UCC-1 financing statements.

2. Ronald Cadillac filed sales and use tax returns without remitting the tax due for the period December 1, 1995 through November 30, 1996. A sales and use tax return with a partial payment was filed for the period September 1, 1997 through November 30, 1997. According to the tax returns which were filed, the total tax due for the periods December 1, 1995 through November 30, 1997 was \$816,473.08. Between November 1, 1996 and November 16, 1998, the Division issued five warrants to Ronald Cadillac for a total amount due of \$1,049,925.93.

3. The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes due to Ronald Cadillac, dated November 23, 1998 (assessment number L-015891547-6), which assessed sales and use tax due in the amount of \$1,565,613.35 plus interest in the amount of \$764,335.46 and penalty in the amount of \$637,127.97 for a balance due of \$2,967,076.78.

4. After operating the business for five or six years, Mr. DeMarco became ill. He was unable to attend to the daily operation of the business and it started failing. Over the ensuing two or three years his health deteriorated. At this juncture, creditors were calling on the telephone and retaining employees became a problem because they did not know what to expect.

5. In March 1998, Ronald Cadillac failed to make a payment on the Note to the Bank. In June 1998, Mr. DeMarco died, and his widow, Virginia DeMarco, was appointed as the Administratrix of the Estate of Ronald DeMarco. The failure to make a payment on the Note and the death of one of the guarantors caused the Bank to declare Ronald Cadillac to be in default and the balance of the financing to be due and payable. At the time of the default, the amount due was \$420,585.62 plus interest and fees.

6. In July 1998, the Bank directed its law firm, Pinks & Arbeit, to collect the balance due under the Note. Mr. Pinks and the credit manager at the Bank agreed that the proper step to take was to liquidate the collateral and proceed against the guarantors. Pinks & Arbeit directed an auctioneer, Robert Linwood, to file a Notice of Sale. Thereafter, the attorneys for Ronald Cadillac, Bellavia & Kassel, P.C., were provided with a notice of public sale indicating that because of various defaults, the Bank was going to exercise its rights against the collateral owned by the dealership and that the sale would occur on July 17, 1998. Bellavia & Kassel, P.C. believed that the Bank had a valid and perfected security interest in the assets of Ronald Cadillac. It also believed that General Motors Assistance Corp. had a valid and perfected security interest in the motor vehicle inventory.

7. Before further action proceeded on the public sale, Bellavia & Kassel, P.C., secured a buyer for the automobile dealership. On July 15, 1998, a letter of intent was executed between Virginia DeMarco, on behalf of Ronald Cadillac, and Thomas McCarthy, as buyer, wherein the parties agreed to execute a formal buy-sell agreement on or before July 28, 1998.

8. On July 15, 1998, Mr. Ciulla, Ronald Cadillac's attorney, persuaded Mr. Pinks to adjourn the scheduled auction and enter into a forbearance agreement pending the execution of an asset purchase agreement by Ronald Cadillac and Thomas McCarthy. The lawyers for Ronald Cadillac told the Bank that they wanted to work out some type of arrangement whereby the dealership would be permitted to sell its assets to satisfy the debt that was owed to the Bank. Toward that end, they entered into negotiations to conduct a private liquidation sale as opposed to a public auction. A private liquidation sale had the potential for Ronald Cadillac to satisfy the full amount of the debt that was owed to the Bank whereas it was anticipated that a public sale

would not have yielded sufficient proceeds to satisfy the indebtedness.¹ On the following day, Mr. Pinks instructed Mr. Linwood to adjourn the auction sale.

9. On July 16, 1998, Mr. Francescone, who was employed by the Division as a Tax Compliance Agent II, first became aware that Ronald Cadillac intended to sell its business when he received a call from a Mr. Pat Cassino, the comptroller of a business which was interested in purchasing Ronald Cadillac at an auction or bank foreclosure. On the following day, Mr. Francescone spoke with Mr. Ciulla about the call from Mr. Cassino. Mr. Ciulla said that the Bank had not foreclosed on Ronald Cadillac and that he was working with his client to keep the business alive. Mr. Ciulla also said that his client had considered selling assets in order to pay its tax liability but that talks with the prospective buyer had concluded and that no sale would occur.

10. The Asset Purchase Agreement was signed on August 17, 1998. By this document, Ronald Cadillac, as seller, agreed to sell substantially all of its assets to Thomas McCarthy and Frank Esposito for a price of \$500,000.00. Subsequently, Mr. McCarthy and Mr. Esposito assigned their interest to petitioner, North Shore Cadillac-Oldsmobile, Inc. ("North Shore"). The purchase price was allocated as follows: (1) the cost of the motor vehicle inventory was premised upon the seller's actual cost as defined by the agreement; (2) \$10,00.00 for "Sales, Service, Marketing Lists, Manuals and Materials, Special Tools and Equipment and Signs" (3) \$40,000.00 for "Furniture, Fixtures and Equipment" and (4) \$450,000.00 for goodwill. The final

¹ Under the terms of the franchise agreement, the repossession of the asset by a secured creditor terminated the agreement. Automakers do this because they do not want a secured creditor to own a franchise and operate an automobile dealership, to which the automaker has to supply automobiles, until such time as it can be sold. Thus, if Ronald Cadillac had conveyed the automobile dealership to the Bank in partial satisfaction of the lien, the franchise agreement would have terminated and the proceeds of any subsequent sale would have been substantially less.

amount to be paid for Ronald Cadillac was subject to change based upon adjustments at the time of closing. The Agreement further provided that other than that which had been previously disclosed to the buyer with respect to the Bank and the Division, there were no legal or governmental actions pending or, to the best of the seller's knowledge, threatened. Further, the parties agreed to comply with the applicable statutory provisions of the New York State law relating to transfers in bulk. The Agreement stated that:

BUYER agrees to timely file the required notice of Bulk Sale with the New York State Department of Taxation and to promptly notify SELLER upon receipt of the tax release form or any other correspondence received from the New York Department of Taxation. BUYER shall be under no obligation to close the transaction until such time as BUYER receives written acknowledgment from the New York State Department of Taxation and Finance which states in relevant part that the BUYER shall purchase SELLER'S assets free and clear of any liability for SELLER'S sales tax and Federal Luxury Tax obligations.

11. Under the Asset Purchase Agreement, Bellavia & Kassel, P.C., acted as the escrow agent with respect to the buyer's down payment and, in this capacity, it held \$50,000.00 in escrow.

12. Title to the automobiles covered by Ronald Cadillac's floor plan passed when GMAC permitted Ronald Cadillac's floor plan to be transferred to North Shore.

13. In a letter dated September 23, 1998, Mr. Ciulla confirmed his client's agreement with the Bank that it would receive \$432,140.06, plus interest from September 16, 1998, at the time of the closing of the sale of the assets. It was the understanding of the attorneys for Ronald Cadillac that the proceeds of the private sale were to be paid to the Bank to the extent of Ronald Cadillac's debt to the Bank as if it had foreclosed.

14. On November 5, 1998, Mr. Francescone called Mr. Ciulla to discuss a sales tax liability in the amount of \$1,565,613.35 arising from a field audit for the quarterly periods ended May 31, 1995 through February 28, 1997. Mr. Francescone told Mr. Ciulla that Ronald Cadillac

must pay the full amount of its outstanding tax liabilities by November 9, 1998 because the amount of tax in arrears was increasing. On the same day, Mr. Francescone met with Jack Pinto, the manager of Ronald Cadillac, and provided him with a Field Memorandum requiring payment of \$1,491,262.00 by November 9, 1998.²

15. On November 13, 1998, Mr. Francescone served Tax Compliance levies on the bank accounts of Ronald Cadillac which were located at Roosevelt Savings Bank and North Fork Bank. At the time of the levies, Ronald Cadillac had assets of \$35,944.18 in its Roosevelt Savings Bank account and \$102,140.18 in its North Fork Bank account for a total of \$138,084.36. The restraint upon the bank accounts was of great concern to Ronald Cadillac because the funds in these accounts were used to operate the dealership. If the levy were not removed, the dealership would not be able to continue operating because it would not be able to make payments to its trade creditors, its employees or to GMAC which had extended dealer floor plan financing.

16. When they were informed that the bank accounts were restrained, Ronald Cadillac's attorneys contacted the Division to determine the basis upon which it was restraining the accounts. Mr. Ciulla advised Mr. Francescone that Ronald Cadillac was trying to sell its business and that the closing would take place in three weeks provided that the monies frozen by the tax levies could be freed in order to allow checks payable to GMAC to be honored. Mr. Ciulla stated that if the Division maintained its levies upon the bank accounts, there would not be a business to sell and no one would be paid from the proceeds of the sale. A resolution was reached wherein it was agreed that the Division would seize half of the proceeds of both

² It is not clear why there was a difference between the amount of the sales tax liability and amount of tax which the Division required.

accounts and leave the remaining half to the dealership to pay its employees and GMAC. It was Mr. Francescone's understanding from this conversation that Mr. Ciulla's client intended to remit the entire amount of the sale proceeds to New York State. Mr. Francescone asked Mr. Ciulla to fax him a copy of the sales agreement, all related documentation and bank statements showing the amount of money in the levied bank accounts. Before agreeing to a partial release of the bank levies, Mr. Francescone wanted to determine whether the Division would obtain more money from the bank accounts which were levied upon or from the sale of the business.

17. On November 17, 1998, Mr. Francescone performed a lien search and discovered the prior lien that the Bank had on the assets of Ronald Cadillac. Mr. Francescone asked Mr. Ciulla to determine the balance owed by Ronald Cadillac to the Bank and whether Ronald Cadillac could obtain a bond to protect the amount of money that the Division had levied upon. Mr. Francescone also asked Mr. Ciulla to procure a list of the frozen accounts and the amount of money in each account. Mr. Ciulla replied that obtaining a bond was impossible and that unless there was a partial release of the levied funds in order to allow the checks drawn to GMAC to clear, GMAC would close the business.

18. On November 18, 1998, Mr. Francescone received the information from Mr. Ciulla regarding the amount of money in the frozen accounts. On the same date, Mr. Ciulla called Mr. Francescone on the telephone and said that Ronald Cadillac owed \$420,000.00 to the Bank of Smithtown and that the purchaser wanted a release from the bulk sales tax liability. Mr. Francescone asked how a bulk sale release was possible if there was only \$80,000.00 remaining from the sale proceeds with which to pay the State. Mr. Ciulla replied that he would ask the Bank if less money would be acceptable and that he would also ascertain if the Bulk Sale Unit would accept less than the full amount of the sale proceeds. On November 19, 1998, a colleague

of Mr. Francescone asked a member of the Division's Bulk Sale Unit to review the proposed sale of Ronald Cadillac. Thereafter, Mr. Francescone was advised that the Bulk Sale Unit would not issue a release unless the full amount of the sale proceeds were conveyed to New York State in satisfaction of Ronald Cadillac's tax liabilities. Mr. Francescone conveyed the position of the Bulk Sale Unit to Mr. Ciulla.

19. On November 20, 1998, the Division issued releases of the liens because Mr. Francescone believed that the Division would obtain \$500,000.00 from the bulk sale if Ronald Cadillac were sold as a going concern. This was substantially more than the amounts in the levied bank accounts. In contrast, Mr. Ciulla believed that the Bank had a perfected security interest which had a priority over other parties with an interest in the collateral that the dealership owned. If Mr. Francescone or his supervisor had known that Ronald Cadillac was not going to remit the proceeds of the sale to New York State, the frozen bank account assets would not have been released.

20. On December 15, 1998, Mr. Toomey, North Shore's attorney, mailed a Notification of Sale, Transfer or Assignment in Bulk to the Bulk Sale Unit which indicated that a sale would take place on December 28, 1998 and that the purchase price would be \$500,000.00. The notification of bulk sale was received on December 18, 1998. Mr. Toomey viewed the transaction as a foreclosure and thought everyone should know what was taking place. Therefore, he prepared the bulk sale notice and mailed it to the Division notwithstanding his belief that the Bank of Smithtown was entitled to the proceeds of the sale as a secured creditor. It was Mr. Toomey's feeling that he was being prudent by sending the notice.

21. On December 28, 1998, Mr. Ciulla called Ms. Denise White, who was in charge of the Division's Bulk Sale Unit, to discuss the priority of the Division's bulk sale lien versus the

Bank's prior perfected UCC lien. Mr. Ciulla told Ms. White that the Bank's lien took priority over the Division's lien and, in response, Ms. White disagreed. Ms. White told Mr. Ciulla that if the transfer was through the execution on the perfected liens then the lien holder would receive the proceeds from the transfer but that if the transfer were through a sale, transfer or assignment in bulk, then the monies belonged to the State. During this conversation, Ms. White learned that the sale would not occur on December 28, 1998 and that Mr. Ciulla was still trying to resolve how the proceeds of the sale would be distributed. Mr. Ciulla said that he was going to negotiate something that everybody would be happy with and that this might include a reduction in the amount that would be acceptable to the Bank. On the basis of this conversation, Ms. White anticipated that the Bulk Sale Unit would be advised of the rescheduled sale date. However, a revised notification of bulk sale with the actual sale date was never submitted to the Division. Further, the parties to the bulk sale transaction did not contact the Division about the change of date.

22. The Division mailed a Notice of Claim to Purchaser to North Shore dated December 29, 1998. The address of North Shore was stated as 920 East Jericho Turnpike, Saint James, New York. It referred to bulk sale number 1998005771. The notice advised North Shore that the seller might have some unpaid sales tax liabilities and suggested that the proceeds of the sale be placed in escrow. It also stated that no distribution of funds or property, to the extent of the amount of the Division's claim, could be made until three conditions were met.³ The Division also mailed a Notice of Claim to Escrow Agent to Leonard Bellavia which stated that the funds

³ The three conditions were "1. The Department of Taxation and Finance has determined the seller's liability, if any. 2. Payment of such liability has been made to the Department (payment may be made from the funds being withheld in accordance with Section 1141(c) of the Tax Law). 3. This office has authorized you to release the funds or property."

should be held in escrow until the same three conditions set forth in the Notice of Claim to Purchaser were satisfied.

23. On January 11, 1999, Ronald Cadillac transferred substantially all of its assets to North Shore pursuant to the Purchase Agreement. Prior to the closing, the Bank had projected that it would receive proceeds in the amount of \$428,000.00 but the level of inventory was such that the actual proceeds were below \$400,000.00.⁴ The Bank's position was that it was not going to proceed with the transaction unless it realized at least \$400,000.00. After a number of conferences, the buyers' attorney said that the buyers were willing to make up the difference so that the Bank would release its secured lien on the dealership's assets. The adjusted purchase price of \$519,508.00 consisted of (1) cash proceeds of \$400,000.00 which were paid to the Bank,⁵ (2) \$63,581.08 hold-back paid by North Shore's GMAC floor plan to Ronald Cadillac's GMAC floor plan for the open floor plan amount for each purchased vehicle, (3) \$300.00 owed to customers for deposits, (4) \$30,963.81 in supplemental floor plan assistance, and (5) \$24,663.11 owed to employees for vacation pay.

24. The Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated March 15, 1999, to petitioner, North Shore Cadillac-Oldsmobile, Inc., which assessed sales and use taxes for the period ending December 28, 1998 in the amount of \$500,000.00. The amount of the assessment was based on earlier documentation which it had received indicating that the sales price was \$500,000.00.

⁴ The purchase price of an automotive dealership changes hourly based on the fact that business is conducted between the time that the contract is entered into and the closing because cars are delivered to the dealership and cars are sold. In practice, the buyer and seller agree to a purchase price and then agree to make adjustments based on the intervening activity. Here, the parties started with a benchmark of \$500,000.00 but it was to be adjusted upward or downward based upon the intervening business activity between the contract and closing.

⁵ The payment left a balance due to the Bank of \$20,585.62.

25. On or about August 2, 1999, the Bulk Sale Unit deposited a check, dated January 11, 1999, drawn on the account of North Shore in the amount of \$4,125.00. The check was made payable to the order of the New York State Department of Taxation and contained the notation "Ronald Closing." During this period, the Bulk Sale Unit had a procedure for processing checks with the goal that all checks be deposited within three business days.

26. On August 10, 1999, Mr. Joseph Nemeth of the law firm of Pinks, Arbeit, Lewis and Nemeth, which represented the Bank, called Thomas Driver, who was employed by the Division, to ask whether the Division's lien or the Bank's lien had priority. Mr. Driver advised him that the Division's bulk sale lien took priority over the Bank's prior perfected UCC lien. Mr. Driver also said that he had processed the check for \$4,125.00 for the sales tax due on the transfer of the tangible personal property.

27. On September 1, 1999, Mr. Nemeth sent a letter by facsimile and mail to Mr. Driver arguing that the purchaser was not informed of a possible claim by the Division. He also argued that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was untimely and that Tax Law § 1141(c), which gives New York a first priority right and lien over a prior perfected security interest results in an "unconstitutional taking." Mr. Nemeth's letter included a copy of the Notification of Sale, Transfer or Assignment in Bulk, dated December 14, 1998, a copy of the letter of December 14, 1998 which accompanied the notification, a copy of the closing statement dated January 11, 1999 and a copy of a check dated January 11, 1999, which Mr. Driver noted, was never forwarded. Mr. Nemeth pointed out that Mr. Driver had acknowledged receiving a replacement check.

28. On September 3, 1999, the Division received the mail copy of the correspondence which was sent by facsimile on September 1, 1999. Prior to the receipt of the closing statements,

the Division was under the impression, on the basis of the Notice of Bulk Sale, that the sale took place on December 28, 1998. The law firm which represented North Shore, the purchaser, never prepared a revised Notification of Sale, Transfer or Assignment in Bulk with a change in the date of the closing from December 28, 1998 to January 11, 1999.

29. When a secured loan falls into default, a secured creditor may proceed by a public or private sale. A secured creditor does not acquire title to collateral in either instance. When there is a public sale, the matter is referred to an auctioneer who will send out a notice of sale. Usually, because of the expense involved, the collateral is not removed from the debtor's premises. The only time a creditor will remove the collateral is when there is a fear that it will be destroyed or converted by the debtor. In this instance, the Bank had permission from the landlord to leave the items in place. This was to the landlord's advantage because when he reacquires the building, everything would be sold.

30. If there is a private sale, the secured creditor usually has the cooperation of the debtor and the debtor will sign over title to the assets to the eventual buyer. A secured creditor will only hold a public auction when the debtor does not agree to sign over the assets or the debtor cannot find a buyer. In a private sale, title transfers directly to the designee of the secured party. The experience in the industry is that public sales generate between 10 and 15 percent of the true value of the items plus there is an auctioneer's fee which is 10 percent of whatever is realized. A party only resorts to a public auction sale as a last resort.

31. The Division submitted affidavits with attachments concerning the mailing of the Notice of Claim. One affidavit was from Michael White who, during the period in issue, supervised the File Section of the Sales Tax Desk Audit File Section. Notices of claim to a purchaser are prepared by Tax Technicians I or Calculation Clerks II. Initially, the information

that will be printed on a notice of claim is entered in the Bulk Sale Unit's computer system by the preparer. Thereafter, the notice of claim is printed and reviewed by the preparer for accuracy. Following the review and, if necessary, correction, the preparer inserts the notice of claim in the appropriate subdivision of a vertical file that corresponds to the date when the notice of claim should be mailed. On the day of mailing, a keyboard specialist picks up the notices of claim that are to be mailed that day and assembles them together with a publication concerning audit rights and responsibilities and a return envelope addressed to a section of the Audit Division. The papers are then folded so that the name and address of the recipient of the notice of claim will be visible through the window of the envelope. Thereafter, the folded materials are inserted into the envelope, without sealing it, so that the recipient's name and address can be seen through the window of the envelope. The keyboard specialist also prints a mail affidavit for that day's mailing of notices of claim to purchasers. At this time, a copy of the mailing affidavit is also made. The keyboard specialist then uses an elastic band to wrap the notices of claim which are to be mailed that day, together with the mailing affidavits.

The keyboard specialist gives the documents to a clerk who signs one copy of the mail affidavit. The clerk also keeps a copy of that day's mail affidavit at his desk and takes the remaining documents to the Division's mail section. The clerk then leaves the envelopes containing the notices of claim and the mail affidavit in the designated in-basket in the Mail Section. A witness signs an affidavit attesting to this fact. Thereafter, an employee of the Mail Section signs an affidavit attesting to the fact that an employee takes the envelopes to a branch of the United States Postal Service and deposits them for mailing.

32. In support of its position that the procedures outlined above were followed with respect to the mailing of the Notice of Claim, the Division submitted a copy of a one-page

mailing record listing, among other numbers, bulk sale number 1998005771. On the first page appears "DATE SENT IS: 12-29-98." Petitioner's name is listed next to bulk sale number 1998005771. Petitioner's address is set forth as 920 E. Jericho Turnpike, St. James, N.Y. The document indicates that five notices of claim were issued on December 12, 1998. The bulk sale number listed on the mailing record for the Notice of Claim matches the bulk sale number listed on the Notice of Claim to Purchaser. The name and address of petitioner listed on the mailing record corresponds with the address for petitioner on the Notice of Claim.

The lower portion of the mailing record is entitled Affidavit of Mailing and states:

ON DECEMBER 29, 1998 I DELIVERED 5 NOTICES IDENTIFIED IN THIS LISTING TO THE MAIL AND SUPPLY SECTION OF THE DEPARTMENT OF TAXATION AND FINANCE, ALBANY, N.Y. AND THERE WITNESSED THE SEALING AND STAMPING OF THE ENVELOPES IN WHICH THEY WERE ENCLOSED. EACH SUCH NOTICE WAS ENCLOSED IN AN ENVELOPE ADDRESSED TO THE TAXPAYER NAMED THEREIN, AT THE ADDRESS SHOWN ON THE NOTICE.

The signature of Joseph A. DeVito appears under this statement, followed by the signature of a witness who was a member of the Mail Processing Center staff, and the date December 29, 1998.

The following statement appears after this date:

ON DECEMBER 29, 1998 I DEPOSITED IN A BRANCH OF THE UNITED STATES POST OFFICE OF ALBANY, NEW YORK, ALL NOTICES DESCRIBED ABOVE, ALL ENCLOSED IN SEALED POSTPAID ENVELOPES.

The signature of an employee of the Mail and Supply Section appears under this statement, followed by the signature of a witness, and the date December 29, 1998.

33. With respect to the mailing of the Notice of Determination, the Division submitted an affidavit, with attachments, from M. Carol Ambuhl who, in March 1999, was employed as a Sales Tax Technician II in the Division's Sales Tax Desk Audit and Bulk Sales Unit. It also

submitted an affidavit from James Baisley who was the Chief Mail Processing Clerk whose duties included supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of the notices and how these procedures were followed in this case.

34. On March 15, 1999, Ms. Ambuhl supervised a Tax Technician I, Vicki Heins, whose duties included the preparation and mailing of notices of determination and demands for payment of sales and use taxes due. In March 1999, there were circumstances when the support staff of the Audit Division would manually prepare the notices. According to Ms. Ambuhl, since the Division has 90 days from the deemed date or the date the Notification of Sale is determined to have been received to issue an assessment, it was necessary to manually prepare the notice to comply with the time requirement.

Here, Ms. Heins prepared an assessment worksheet and gave it to a keyboard specialist who typed the assessment. Thereafter, the notice was given to Ms. Heins to review. Following her review, Ms. Heins gave the Notice to Mr. Joseph De Vito who, as part of his regular duties, completed the certified mail record ("CMR"). A CMR is a list of taxpayers to whom notices were sent by certified mail on a particular day. A certified control number (P 482 624 114) was assigned to the notice of determination listed on the CMR and a certified control number sticker was affixed by Mr. De Vito to the envelope for the taxpayer. Thereafter, Mr. De Vito delivered the notice of determination and the CMR to the Division's mail processing center. Each page of the CMR is a separate and individual CMR for the notices listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender," the "Total Number of Pieces Received at Post Office," and "Postmaster, Per (Name of Receiving Employee)" for the

notices of determination listed on that page. Only the Notice of Determination mailed to North Shore on March 15, 1999 was listed on this mail log.

Ms. Ambuhl asserts that she examined the CMR attached to her affidavit and that it is a true and accurate copy of the CMR for the Notice of Determination issued by the Audit Division on March 15, 1999 to North Shore. In the upper left corner of the document there is a space for inserting the name and address of the sender. That space contains the following handwritten inscription:

NYS Dept. Tax & Finance 3-15-99
State Campus Bldg. 9
Sales Tax Desk Audit Rm 328
Albany NY 12227

On the right side of the CMR, a postal employee affixed a United States postmark.⁶ At the bottom of the page the postal employee wrote the number of pieces received, that is, one, and signed the CMR.

The Division's Mail Processing Center returned a copy of the CMR to the Audit Division with the postmark affixed. Ms. Ambuhl asserts that the procedures described in her affidavit were the normal and regular procedures of the Audit Division on March 15, 1999 and that the CMR is kept in the Audit Division as a permanent record.

35. The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for outgoing certified mail. A

⁶ The date of the postmark on the CMR in evidence is not legible.

CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine, which places each statutory notice into an envelope, weighs and seals the envelopes and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS has been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employees to process the certified mail and make the appropriate notations on the CMR. On the following day, the CMR is picked up at the USPS by a member of the Mail Processing Center staff, whereupon it is returned to the originating unit. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. The foregoing procedures were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and these procedures were followed on March 15, 1999.

36. In support of its position that the procedures outlined in Findings of Fact "34" and "35" were followed in this case, the Division submitted, together with the affidavits, a copy of

the CMR listing petitioner's name and a copy of the notice of determination at issue in the present matter. The CMR consists of one page with one entry. It shows a handwritten date of "3-15-99." There is one certified control number listed, which is P 428 624 114. There is a United States Postal Service postmark on the CMR. A signature appears in the box for "Postmaster, Per (*Name of Receiving Employee*)."

In the box for "Total Number of Pieces Received at Post Office" a handwritten number one appears. It is asserted in Mr. Baisley's affidavit that the signature and United States Postal Service Postmark on the CMR indicate that the post office received the mail listed on the CMR.

37. The certified number listed on the CMR for the notice sent to petitioner (P 428 624 114) matches the certified number shown on the first page of the notice. The name and address of petitioner as listed on the CMR also correspond to the information set forth on petitioner's notice. The handwritten date on the CMR is the same as the date appearing on the Notice of Determination.

SUMMARY OF THE PARTIES' POSITIONS

38. Petitioner argues that the Notice of Determination was erroneous because the transaction in issue was a private foreclosure sale in settlement or realization of the Bank's security interest and not a bulk sale under Tax Law § 1141(c) and 20 NYCRR 537.1(a)(4). Petitioner submits that the exclusion from the definition of a bulk sale for a transfer in settlement or realization of a security interest must be defined with reference to the Uniform Commercial Code and that under UCC § 9-504, a creditor may hold a public or private sale of the debtor's assets and thereby recover all or part of the amount due. It maintains that there was no practical way to conduct this sale and achieve any value other than the way it was actually structured. If

there had been a public sale, the Bank would have collected \$40,000.00 or \$50,000.00 and nothing would have been available to the State.

Petitioner next argues that the Notice of Determination was defective because the Division failed to comply with the requirements of Tax Law § 1141 and the corresponding regulations. Specifically, it is petitioner's contention that the Division failed to comply with the 5-day notice requirement of 20 NYCRR 537.6(a) and the 90-day notice requirement set forth in 20 NYCRR 537.6(c).

Petitioner's last argument is that Tax Law § 1141(c) is unconstitutional because it gives priority to New York's claim over a previously filed security interest.

39. In response to the foregoing, the Division argues: that the transfer of substantially all of Ronald Cadillac's assets to North Shore on January 11, 1999 constituted a bulk sale under Tax Law § 1141(c); that the Division met its statutory and regulatory requirements, which commenced on September 1, 1999, when it was notified of the actual sale date of January 11, 1999; that North Shore was required to set aside the consideration for the purchase of Ronald Cadillac's assets; that the UCC lien priorities are not applicable to the Division's bulk sale lien because the UCC liens apply to competing creditors who are seeking to recover the security for funds or property advanced to the debtor; that North Shore is estopped from contesting the applicability of Tax Law § 1141(c) because the Division relied, to its detriment, on North Shore's representations; that the Division of Tax Appeals presumes the facial constitutionality of the Tax Law; and, that the Court of Appeals has found Tax Law § 1141(c) to be constitutional.

CONCLUSIONS OF LAW

A. The first issue presented is whether the transfer of substantially all of Ronald Cadillac's assets constituted a bulk sale under Tax Law § 1141(c). Under the provisions of Tax

Law § 1141(c), whenever a person required to collect tax makes a sale in bulk of any part of his business assets, other than in the ordinary course of business, the purchaser is required, at least ten days prior to taking possession of the assets or paying therefore, to notify the Division of the proposed sale and provide certain information. The term “bulk sale” is defined at 20 NYCRR 537.1(a)(1), which provides in relevant part that:

[t]he term *bulk sale* as used in this Part means any sale, transfer or assignment in bulk of any part or the whole of business assets, other than in the ordinary course of business, by a person required to collect tax and pay the same over to the Department of Taxation and Finance. (Emphasis in original.)

B. On its face, the transaction at issue in this matter falls squarely within the definition of a bulk sale. As a registered vendor of tangible personal property, it is clear that Ronald Cadillac was a person required to collect tax within the meaning of Tax Law § 1131(1). Further, the transfer of substantially all of its assets was not in the ordinary course of business of Ronald Cadillac (*see*, 20 NYCRR 537.1[d][2]).

C. Section 537.1(a)(4) of the Commissioner’s regulations exclude the following transactions from the definition of a bulk sale:

(i) sales, transfers or assignments of business assets in settlement or realization of a valid lien, mortgage or other security interest;

(ii) sales, transfers or assignments of business assets by executors, administrators, receivers, trustees in bankruptcy or any public officer under judicial process.

Petitioner notes that under section 9-504 of the Uniform Commercial Code (“UCC”) a creditor may hold a public or private sale of the debtor’s assets in order to recover all or part of the amount due. It also notes that the phrase sales or transfers in settlement or realization of a security interest is not further defined in the Commissioner’s regulations. However, citing to *American Metal Finishers v. Paleschi* (55 AD2d 499, 391 NYS2d 170), petitioner argues that

the term does appear in section 6-103(3) of the UCC and has been judicially interpreted to include private sales such as that which occurred in this matter. Thus, petitioner concludes that the transaction was not a bulk sale within the meaning of Tax Law § 1141(c) and 20 NYCRR 537.1(a)(4)(i).

D. Contrary to the position taken by petitioner, the bulk sale provisions of the UCC are not applicable to the bulk sale provisions of the Tax Law. In reaching this conclusion, several points should be borne in mind. First, the purpose of the bulk transfer provisions of the UCC is to prevent commercial fraud. (Official Comment, McKinney's Cons Laws of NY, Book 62½, Uniform Commercial Code, § 6-101). The fraud might arise from a merchant, in debt, who (1) either sells his inventory to a friend for less than it is worth in the hope of entering the business again in the future or (2) sells his inventory and disappears with the proceeds (*id*). In contrast, the purpose of Tax Law § 1141(c) is to preserve the Division's "indisputable right to collect taxes which could be extinguished by the simple expedient of a taxpayer transferring its assets" (*Harcel Liqs. v. Evsam Parking*, 48 NY2d 503, 423 NYS2d 873; *see also, Spandau v. United States*, 73 NY2d 832, 537 NYS2d 120). The difference between the UCC and Tax Law statutory schemes has been recognized in the case law. For example, in *Matter of Long Island Reliable Corp. v. Tax Commn.* (72 AD2d 826, 421 NYS2d 658, *lv denied* 49 NY2d 707, 428 NYS2d 1027) the petitioner argued that Tax Law § 1141(c) does not apply to the sale of intangibles based on the definition of a bulk sale set forth in the UCC. The Court disagreed with this position and stated that "[t]he reference to the Code [in Tax Law § 1141(c)] relates to the *additional liabilities* a purchaser is subject to if he fails to give timely notice of a sale. We do not conclude that the definition of bulk sale is, therefore, circumscribed by article 6 of the Code." (Emphases added.) Accordingly, it is determined that petitioner's reliance upon the

definition of a bulk sale set forth in the UCC is misplaced and that the transaction is a bulk sale within the meaning of Tax Law § 1141(c).

E. Petitioner has attempted to characterize the transaction herein as a private foreclosure sale in order to bring the sale within the exemptions described in 20 NYCRR 537.1(a)(4). This argument is without merit. As noted by the Division, the exceptions described in this regulation merely make explicit that the provisions of Tax Law § 1141(c) apply only when the sale is made by a person required to collect tax. Acceptance of petitioner's contention would completely eviscerate the legislative intent of Tax Law § 1141(c) which, as just stated, is to preserve the Division's right to collect taxes which would be eliminated by the mere expedient of a taxpayer transferring its assets (*Harcel Liqs. v. Evsam Parking, supra*).

F. Petitioner next argues that the Division failed to comply with 20 NYCRR 537.6(a), which requires the Division, within five business days of receiving notice of the bulk sale, to either acknowledge receipt, give advice to the purchaser as to whether the notice is proper, or give notice of a possible claim. Petitioner further contends that the Division failed to comply with 20 NYCRR 537.6(c) because it did not give 90 days notice of the taxes due.

G. A purchaser in a bulk sale transaction must notify the Division of the impending transaction by registered mail at least 10 days prior to taking possession of or paying for the business and also inform the Division of:

the price, terms and conditions thereof whether or not the seller, transferor or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing. (Tax Law § 1141[c].)

The Division has five business days from receipt of a notification of sale to respond by mailing an acknowledgment of receipt of the notice, an explanation that the notification is

incomplete or incorrect, a notice of possible claim for sales and use taxes due to the purchaser and seller, or any combination of these documents (20 NYCRR 537.6[a]). In general, if the Division fails, within five business days, to mail a notice of possible taxes due, the purchaser is relieved of any liability for the taxes determined to be due from the seller and of any obligation to withhold the proceeds of the sale from the seller (20 NYCRR 537.6[b]).

The Division has 90 days from receipt of notification from the purchaser of the impending sale to inform both the seller and the purchaser of the sales and use taxes determined to be due from the seller (Tax Law § 1141[c]; 20 NYCRR 537.6[c]). Also pursuant to 20 NYCRR 537.6(c) and (d), if the Division fails to notify the purchaser and seller within the 90-day period, the purchaser is no longer required to withhold any proceeds due to the seller. For the 90-day period to commence, any notification of sale submitted by a purchaser “must be in substantial compliance with section 1141(c) of the Tax Law” (20 NYCRR 537.2[a]).

When issuing a notice of determination, the Division must mail the document by registered or certified mail (Tax Law § 1147[a][1]). If the Division is able to show that a notice was properly mailed, the Division is entitled to the presumption that the notice was received by the person to whom it was addressed (Tax Law § 1147[a][1]).

H. Here, the Division has correctly pointed out that petitioner’s notice of claim argument is moot. The regulations of the Commissioner provide, in pertinent part, that:

If the Division of Taxation fails within five business days to mail a notice of possible claim for taxes due the State, and such purchaser, transferee or assignee has given proper (both as to service and contents) and timely notice, the purchaser, transferee or assignee is relieved from his obligation to withhold any funds from the seller, transferor or assignor, and is relieved from liability for taxes due *except in the situation and to the extent that there are outstanding warrants or judgments for unpaid sales tax liability due and owing by the seller.* (20 NYCRR 537.6[b]; emphasis added.)

In this case, between November 1, 1996 and November 16, 1998, the Division filed five sales tax warrants against petitioner. The cumulative amount assessed by the five warrants exceeds the derivative liability of petitioner. Therefore, petitioner is liable for the taxes in issue regardless of whether the Division issued a timely notice of claim.

I. Petitioner next argues that the Division failed to comply with 20 NYCRR 537.6(c) in that it failed to give timely notice of the amount of taxes due within 90 days from receipt of the notice of sale. As noted earlier, the Division has 90 days from receipt of notification from the purchaser of the impending sale to inform both the seller and the purchaser of the sales and use taxes determined to be due from the seller (Tax Law § 1141[c]; 20 NYCRR 537.6[c]). For the 90-day period to commence, any notification of sale submitted by a purchaser “must be in substantial compliance with section 1141(c) of the Tax Law” (20 NYCRR 537.2[a]). If any information required to be reported on the notification of sale changes, proves to have been incorrect or was not available when the notice was originally filed, the purchaser must file a revised notice with the Division (20 NYCRR 537.2[e]). To the extent relevant, the Commissioner’s regulations provide that the notice of bulk sale shall include the date of sale, the total sales price of the business property and a breakdown of the total sales price paid. (20 NYCRR 537.2[d][iv], [v], [vi].) The notification of bulk sale sent by North Shore for the anticipated sale of December 28, 1998 was deficient with respect to each of the foregoing requirements. These failures evoke the provisions of 20 NYCRR 537.2(e)(1) which state that a purchaser must file a revised notice of bulk sale with the Division if any information required to be included in the original notice was incorrect or unavailable at the time the original notice was filed. Here, it is undisputed that petitioner did not file a revised notice of bulk sale. In its place, a copy of the Closing Statement was sent by facsimile and mail to the Division on September 1,

1999. There is no evidence that any other revised notification of bulk sale was sent to the Division before this date.

J. The next question presented concerns the date of mailing of the Notice of Determination. In order to establish the date of mailing, the evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales and Service*, Tax Appeals Tribunal, May 23, 1991). The mailing of a notice of determination is established by evidence of a general mailing procedure together with a properly completed CMR (*see, Matter of Katz, supra*).

K. Through the evidence it has submitted, the Division has established that the notice of determination was, in fact, mailed to petitioner on March 15, 1999. First, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Division employees involved in the notice generation and issuance process. In particular, the Ambuhl and Baisley affidavits generally describe the various stages of the issuance process and, in addition, attest to the veracity of the Notice of Determination sent to petitioner on March 15, 1999 as certified number P 428 624 114.

Second, the Division established that the general issuance procedures were followed on March 15, 1999. The certified record, which consists of one page, is presented in its entirety and shows that one article of mail was listed on the record and one item was received at the post office. The CMR bears the stamp of the Colonie Center branch of the United States Post Office. The date of the mailing is evidenced by the presence of a handwritten date of “3-15-99”

next to the entry for name and address of the sender. Each of the foregoing facts directly supports the conclusion that the mailing of the notice occurred as claimed by the Division.

L. At the earliest, petitioner provided notice of the sale on September 1, 1999. Assuming without deciding that this notification constituted adequate notice of the sale, the Division had 90 days from this date to issue a notice of determination. It follows that since the Notice was issued before this date, it was timely.

M. Where, as here, the Division issues a timely notice of claim, North Shore was forbidden from transferring any sums of money, property or choses in action to the extent of the amount of the Division's claims against Ronald Cadillac for sales tax (Tax Law § 1141[c]; 20 NYCRR 537.3[b]). In accordance with Tax Law § 1141(c) and 20 NYCRR 537.3(b), North Shore's failure to withhold the amount of the consideration due to the seller results in derivative liability up to the amount of the greater of the selling price or the fair market value of the assets transferred. Here, the assessment of \$500,000.00 is less than the potential liability based upon the adjusted purchase price of \$519,508.00. Therefore, it was proper for the Division to assert that tax was due in the amount of \$500,000.00.

N. Except for mechanics liens, the UCC specifically exempts statutory liens from the priorities of the UCC lien provisions (*see*, UCC §§ 9-102[2]; 9-104; *Matter of Klausner Supply Co. v. Chemical Bank* (Sup Ct, NY County, April 20, 1984, Gammernan, J., *affd* 113 AD2d 1034, 493 NYS2d 676). Since the Division gave timely notice of the tax due, its lien has a priority over the prior lien filed by the Bank (Tax Law § 1141[c]).

O. In view of the foregoing, the Division's argument that North Shore should be estopped from contesting the conclusion that the transfer of the automobile dealership was a bulk sale is moot and will not be addressed.

P. Petitioner argues that Tax Law § 1141(c) is unconstitutional because it elevates the Division's claim over prior filed security interests. It is contended that it is unreasonable to elevate the Division's claim in the context of a bulk sale where the Division has no equity in the assets.

Q. It has been recognized that the jurisdiction of the Tribunal and the Division of Tax Appeals is proscribed by its enabling legislation (*Matter of Fourth Day Enterprises*, Tax Appeals Tribunal, October 27, 1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (*see, e.g., Matter of Bucherer*, Tax Appeals Tribunal, June 28, 1990; *Matter of Phelps*, Tax Appeals Tribunal, November 2, 1989; *Matter of Fourth Day Enterprises, supra*; *cf., Matter of J. C. Penney Co.*, Tax Appeals Tribunal, April 27, 1989 [holding that the issue of the constitutionality of the Tax Law as applied was properly before the Tribunal]). Therefore, there is no jurisdiction to consider petitioner's contention that Tax Law § 1141(c) is unconstitutional since it elevates the Division's claim above the previously filed security interest of the bank.

R. The petition of North Shore Cadillac-Oldsmobile, Inc. is denied.

DATED: Troy, New York
March 7, 2002

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE